

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

John Moss

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM
AUTOMATIC STAY

Debtor

Chapter 7, Case No. 04-45397

TO: John Moss, INCLUDING TRUSTEE AND OTHER INTERESTED PARTIES

1. Mortgage Electronic Registration Systems, Inc., ("Movant"), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 pm on November 4, 2004, in Courtroom 8 West, 300 South Fourth Street, Minneapolis, MN 55415 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on November 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than October 26, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on September 27, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtor, subject to a mortgage to Movant.

6. Debtor above-named is the owner of certain real property located at 15 South 1st Street #A1713, Minneapolis, MN 55401, legally described as follows, to-wit:

Apartment Number A-1713, Apartment Ownership Number 23, River Towers
Condominium located in Hennepin County, Minnesota.

7. The indebtedness of John Moss is evidenced by a Promissory Note and Mortgage dated October 27, 2003, filed for registration in the Hennepin Registrar of Titles' office on December 2, 2003, and memorialized as Document No. 3885527 on Certificate of Title No. 807990. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. The Debtor has failed to pay monthly mortgage payments since February 1, 2004, and is in default in the amount of \$4,500.67 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtor has failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is \$97,867.56.

10. The Debtor has estimated the value of the homestead as \$110,000.00, and accordingly, Debtor has limited equity in the premises and, presuming typical selling costs, has no equity in the property and therefore cause exists to find lack of adequate protection.

11. Upon information and belief, Debtor intends to permit the foreclosure sale of the real property and has no intention of reaffirmation of the debt.

12. The undersigned attorneys have commenced foreclosure proceedings, which proceeding was terminated as a result of the filing of the bankruptcy petition on September 27, 2004.

13. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: October 18, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

John Moss

AFFIDAVIT OF PETITIONER

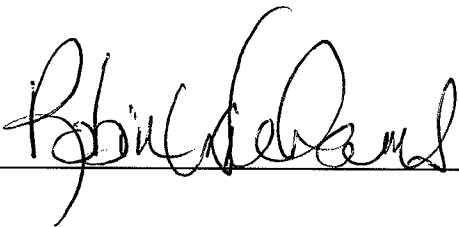
Debtor

Chapter 7, Case No. 04-45397

STATE OF California)

COUNTY OF San Diego)

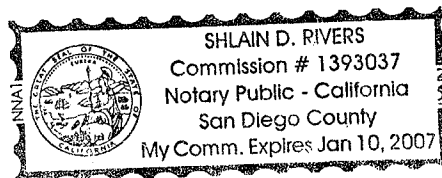
Robin Williams, being first duly sworn, deposes and states on oath that she/he is employed by Mortgage Electronic Registration Systems, Inc., the movant in this action, that she/he has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her/his knowledge to the best of her/his information.



Subscribed and sworn to before me this
6 day of Oct, 2004.



Notary Public



3885527

9A

807990

3885527

OFFICE OF THE REGISTRAR
OF TITLES
HENNEPIN COUNTY, MINNESOTA
CERTIFIED FILED ON
DEC 2 2003
BY *Michael J. [Signature]*
REGISTRAR OF TITLES
DEPUTY

Loan No: 013105523195
Borrower: JOHN N MOSS

Data ID: 512

This instrument was drafted by Middleberg, Riddle & Gianna
717 N. Harwood, Suite 2400
Dallas, TX 75201

Return to: AEGIS LENDING CORPORATION
ATTENTION: LOAN SHIPPING, REG 14
P.O. BOX 84308
BATON ROUGE, LA 70884

Return to:

NETCO, Inc.
7362 University Avenue
Suite 200
Ridley, MN 55432
(763) 571-8193

[Space Above This Line For Recording Data]

MORTGAGE

10-346735
MIN: 100055101315231959

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated October 27, 2003, together with all Riders to this document.

(B) "Borrower" is *JOHN N MOSS*. Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is AEGIS LENDING CORPORATION. Lender is a Corporation organized and existing under the laws of the State of DELAWARE. Lender's address is 10049 NORTH REIGER ROAD, BATON ROUGE, LA 70809.

(E) "Note" means the promissory note signed by Borrower and dated October 27, 2003. The Note states that Borrower owes Lender NINETY-THREE THOUSAND FIVE HUNDRED and NO/100.....Dollars (U.S. \$ 93,500.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than November 1, 2033.

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

Henn Co MRT
CEU # 26272
11/20/2003
Paid \$224.40

MINNESOTA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Modified by Middleberg, Riddle & Gianna

Form 3024 1/01

(Page 1 of 13 Pages)



0131055231950130

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|---|---|--|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input checked="" type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider | |
| <input type="checkbox"/> Other(s) [specify] | | |

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the County of HENNEPIN:

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

APARTMENT NUMBER A-1713, APARTMENT OWNERSHIP NUMBER 23, RIVER TOWERS CONDOMINIUM
LOCATED IN HENNEPIN COUNTY, MINNESOTA.

COMMONLY KNOWN AS: 15 SOUTH 1ST ST. #1713A, MINNEAPOLIS, MN 55401

PARCEL NUMBER: 23-029-24-32-0313

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

John Moss

MEMORANDUM OF LAW

Debtor

Chapter 7, Case No. 04-45397

Mortgage Electronic Registration Systems, Inc. ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, duly perfected mortgage on real property owned by the Debtor. On the date this case was filed, the Debtor was delinquent in respect of payments due under the note and mortgage. Since this case was filed Debtor has made no payments to Movant and as of this date the total debt is in the amount of \$97,867.56. The Debtor estimates the property value at \$110,000.00.

ARGUMENT

Under Section 362(d)(1), the Court shall grant relief from the automatic stay upon a creditors request "for cause, including the lack of adequate protection of an interest in property." Under Section 362(d)(2) relief shall be granted "if the debtor has no equity in the property and the property is not necessary for an effective reorganization".

Under the "equity cushion" theory, a creditor is adequately protected if the Debtor has equity in the property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses. Equitable Life Assurance Society vs. James River Assocs. (In re James River Assoc.), 156 B.R. 494 (E.D. Va. 1993). The amount of equity cushion sufficient to adequately protect a creditor is made on a case-by-case basis. Kost vs. First Interstate Bank (In re Kost), 102 B.R. 829, 831 (D. Wyo. 1989). In Kost, the court observed the following:

Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection. . . . Case law has almost uniformly held that an equity cushion under 11% is insufficient to constitute adequate protection. . . . Case law is divided on whether a cushion of 12% to 20% constitutes adequate protection.

Id. at 831-32 (citations omitted).

Here, the equity cushion is less than * percent. This slight equity cushion, coupled with other factors, shows that Movant is not adequately protected. Debtor has failed to make any payments on the loan for 4 months and interest continues to accrue. Moreover, even if the Debtor succeeds in selling the property for a price near the estimated value, the equity will be depleted after payment of the sale and closing costs. Accordingly, Movant is not adequately protected. See In re Kerns, 111 B.R. 777, 789-90 (S.D. Ind. 1990); Bargas vs. Rice (In re Rice), 82 B.R. 623, 627 (Bankr. S.D. Ga. 1987); First Agricultural Bank vs. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.), 46 B.R. 892, 899 (Bankr. D. Mass. 1985); In re Kertennis, 40 B.R. 895, 899 (Bankr. D.R.I. 1984).

Since Movant is not adequately protected, it is entitled to relief from the automatic stay pursuant to §362(d)(1). As there is no true equity here, and the property in a Chapter 7 is not necessary for a reorganization, relief is also appropriate under §362(d)(2).

Accordingly, Movant is entitled to an Order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: October 18, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

John Moss

Debtor

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-45397

Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on October 18, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Timothy D. Moratzka
Chapter 7 Trustee
901 Marquette Avenue Suite 1400
Minneapolis, MN 55402

Curtis K. Walker, Esq.
Attorney at Law
4356 Nicollet Avenue South
Minneapolis, MN 55409

John Moss
15 South 1st Street #A1713
Minneapolis, MN 55401

/E/ Erin Kay Buss
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

John Moss

ORDER

Debtor.

Chapter 7, Case No. 04-45397

The above entitled matter came on for hearing upon motion of Mortgage Electronic Registration Systems, Inc., ("Movant"), pursuant to 11 U.S.C. Section 362 on November 4, 2004, at the U.S. Bankruptcy Court, Minneapolis, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Apartment Number A-1713, Apartment Ownership Number 23, River Towers
Condominium located in Hennepin County, Minnesota.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this __ day of _____, 2004.

Judge of the Bankruptcy Court